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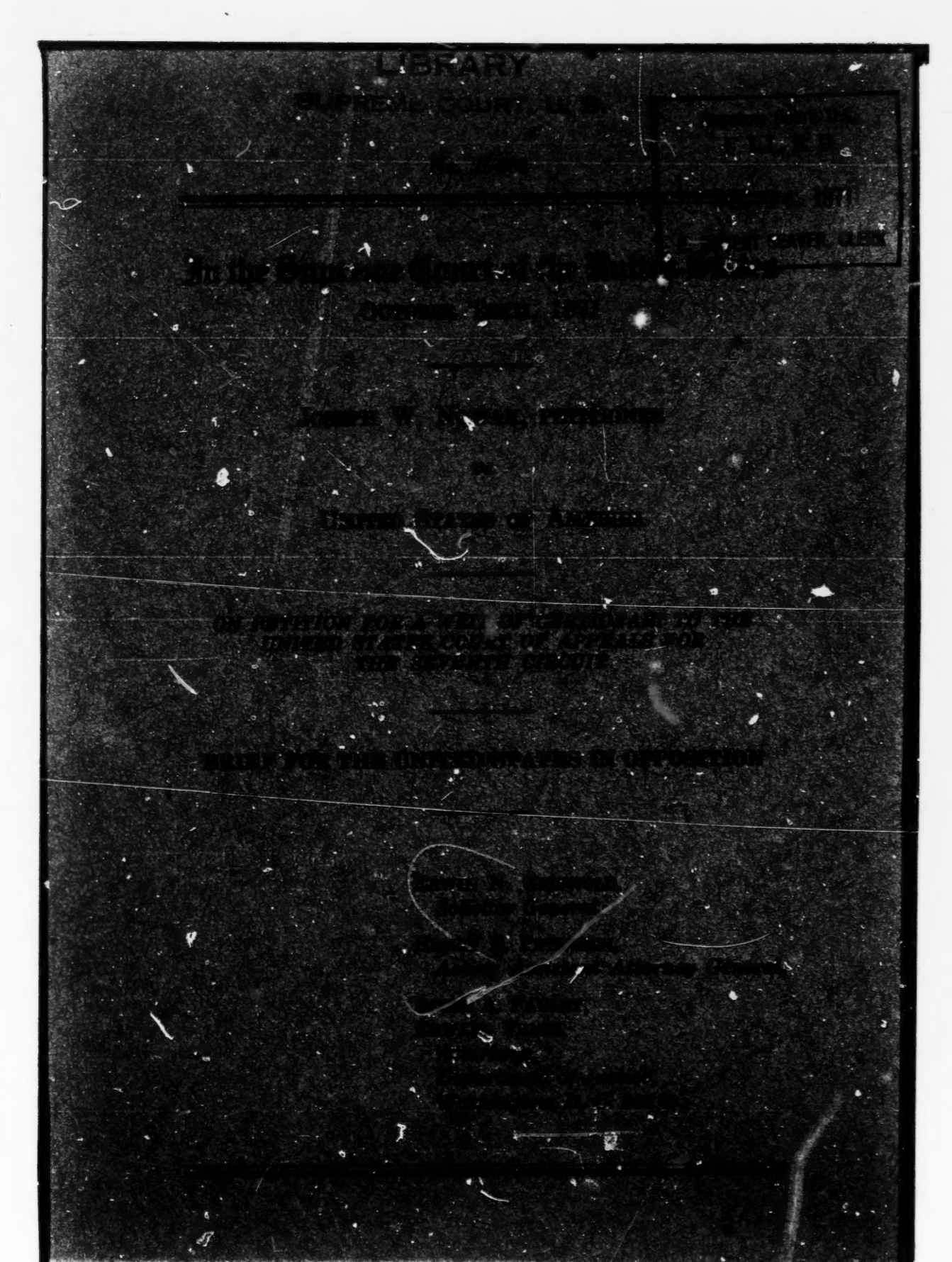

INDEX

	Page
Opinion below	1
Jurisdiction	1
Questions presented	2
Statement	2
Argument	6
Conclusion	10

CITATIONS

Cases:

Brulay v. *United States*, 383 F. 2d 345, certiorari denied, 389 U.S. 986	8
Lawn v. *United States*, 355 U.S. 339	9
Pinkerton v. *United States*, 328 U.S. 640	8
Quercia v. *United States*, 289 U.S. 466	8
Reese v. *United States*, 353 F. 2d 732	8
United States v. *Armone*, 363 F. 2d 385, certiorari denied, *sub nom. Viscardi* v. *United States*, 385 U.S. 957	8
Westfall v. *United States*, 274 U.S. 256	7

Statutes:

12 U.S.C. 1725	7
12 U.S.C. 1824	7
18 U.S.C. 371	2
18 U.S.C. 657	2
18 U.S.C. 1001	2
18 U.S.C. 1006	2
18 U.S.C. 1008	2

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-603

JOSEPH W. NOWAK, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 448 F. 2d 134.

JURISDICTION

The judgment of the court of appeals was entered on July 26, 1971. A petition for rehearing was denied on October 5, 1971. On October 29, 1971, the petition for a writ of certiorari was filed. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the federal criminal statutes dealing with the Federal Savings and Loan Insurance Corporation, the agency charged with insuring funds placed on deposit with state chartered savings and loan associations, are constitutional.

2. Whether evidence of an overt act not charged in the indictment was properly received in evidence.

3. Whether the trial court's comments made in an effort to control defense cross-examination of a government witness constituted reversible error.

4. Whether the rebuttal argument of government counsel as to the reason for the government's non-use of witnesses later called by the defense constituted prejudicial error.

STATEMENT

After a jury trial in the United States District Court for the Northern District of Illinois, petitioner and William Szarabajka were convicted of having conspired to violate four sections of the criminal code (18 U.S.C. 657, 1001, 1006, 1008), in violation of 18 U.S.C. 371. On January 12, 1970, petitioner was sentenced to three years' imprisonment. The court of appeals affirmed (Pet. App. A 1-13). Co-defendant Szarabajka was also convicted but did not appeal.

1. The sufficiency of the evidence is not disputed. It showed that between 1961 and 1964, as a result of the misapplication of funds, the assets of Service Savings and Loan Association (Service) in Summit, Illinois, were depleted by approximately $21,000,000

(5 T. 1062, 11 T. 2255).[1] Service was a state chartered savings and loan association; its deposits were insured by the Federal Savings and Loan Insurance Corporation (FSLIC) and its operations were subject to regulation by the Federal Home Loan Bank Board (Board)[2] (2 T. 62-63, 3 T. 481-485, 4 T. 791, 831, 11 T. 2289, 2312-2313). During this period, Service was controlled by William Szarabajka, its president. Until December 1963, petitioner served as its attorney (2 T. 84-87, 4 T. 637-639, 11 T. 2299-2300).

In addition to individual deposits, a savings and loan association may acquire bloc deposits by dealing with money brokers. Such brokers, for a fee, engage in the business of directing the deposits of investors into selected savings and loan associations; such funds remain on deposit for a one year or an eighteen month contractual period (2 T. 120, 171, 184, 4 T.

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[1] "T." preceded by the volume number refers to the fourteen-volume trial transcript which we are lodging with the Clerk of this Court. On file with the Clerk is petitioner's appendix, herein referred to as "App."

[2] The function of the FSLIC is to charge premiums, pay losses, and seek to recover misapplied funds by means of civil suits and liquidation of the assets of defaulting savings and loan associations.

The Board is a federal agency with its home office located in Washington, D.C. Under the federal home loan bank system, regional reserve banks, known as Federal Home Loan Banks, are capitalized and owned by the member savings and loan associations in the region. When an association is state-chartered, but federally insured, the federal supervision is done in cooperation with state authorities (3 T. 481, 4 T. 791, 831, 11 T. 2289, 2312).

827). "Brokered deposits" are expensive to acquire, and apt to affect the liquidity of the receiving association (4 T. 682-684, 759-762). As a result, in 1961, the Board promulgated a regulation which put reporting requirements upon insured associations and limited the volume of such deposits to a percentage of an association's total capital (11 T. 2293-2294).

From 1961 onward, Service's income was insufficient to pay the dividends promised to depositors. In order to obtain the funds needed for such dividends, Service used a combination of new brokered deposits and new loans—primarily three in number. Service found borrowers who were willing to pay high costs for loans (*e.g.*, 2 T. 100-102). It required them to arrange for brokered deposits, thus giving Service the funds with which to make the contemplated loan. Before receiving their loans, the borrowers had to pay Service a bonus for making the loan, as well as prepaid interest. From these funds, Service, during 1961-1964, was able to pay its depositors their semi-annual dividends (*e.g.*, 2 T. 104, 4 T. 826, 5 T. 937, 974, 8 T. 1580). At least one of the loans made under these circumstances was not repaid (4 T. 642, 8 T. 1727).

Petitioner drafted the loan commitments. He advised as to how the mortgaged property was to be valued, suggested the money brokers that the prospective borrowers should use, and, in one instance, profited personally from the making of a loan. During the years 1961-1963, the Board made inquiries of Service as to sources of its funds and the security of its loans. The answers, drafted by petitioner and

signed by officers of Service, falsely recited that Service had no knowledge of commissions being paid to brokers for deposits, that no money brokers had been used to obtain the funds advanced to one Sherman for his Riverwoods project, and that Sherman's financial statement had been seen by petitioner in 1961 and found to be satisfactory (*e.g.*, 2 T. 109, 112, 120-128, 138; 4 T. 670, 675, 806; Pet. App. A 2-4).

2. Petitioner was indicted on February 6, 1969 (Pet. App. A 8-9). Overt acts alleged and proved in furtherance of the conspiracy were performed by co-conspirators William and Edward Szarabajka.[3] For example, they caused Service, at the end of February 1964 and during March of the same year, to pay depositors the semi-annual dividends and return some brokered deposits to money brokers. (Overt acts u, w; 4 T. 826-827, 7 T. 1461, 1487-1489). Edward also testified to an overt act pertaining specifically to petitioner, not charged in the indictment, that occurred in February or March 1964. Edward had served as vice-president of Service and had supervised the keeping of the records pertaining to brokered deposits. Instead of having notations made on the depositors' account cards as to the brokered source of the funds on deposit, he directed an assistant, Miss Emry, to make secret monthly lists of the brokers and the deposits to be credited to them. Near the end of February or in early March 1964 petitioner advised Edward to re-instruct Miss Emry to keep secret the

[3] Edward was the brother of Service's president William, and was named as an unindicted co-conspirator. He testified as a government witness.

existence of these monthly lists and not to let regulatory examiners know of them (6 T. 1225, 7 T. 1297-1300, 1375, 1406, 1410, 8 T. 1515; App. 41, 44, 46, Pet. App. 10).

ARGUMENT

1. In 1958, FSLIC retired its stock and returned to the United States Treasury the initial capital which had been advanced to it in 1934 for the insurance of deposits. Because of this, petitioner argues that the Corporation no longer possesses the necessary constitutional ingredients to support federal criminal legislation affecting the dealings of state-chartered institutions (Pet. 21-28). The court below properly rejected this contention (Pet. App. A 4-8). Despite 1958 changes, the FSLIC continues to carry out the intent of Congress that home ownership and the encouragement of savings be furthered by its insuring of deposits made with state-chartered savings and loan associations and it is designated as an agency of the United States (see Pet. App. A 4-5). As the court below pointed out, "Congress is not limited by traditional notions of corporate powers and organization but may mold its vehicle in any way which appears useful to the accomplishment of the legislative purpose" (Pet. App. A 6). We also point out that such state associations are banking institutions and that, therefore, the FSLIC is comparable to the Federal Deposit Insurance Corporation which insures deposits placed with banks affiliated with the Federal Reserve System. Both have retired their stock and returned their capital to the United States

Treasury; both use their own assets as reserves and possess a residual power to borrow fom the United States to buttress their respective insurance liabilities (Compare 12 U.S.C. 1725 with 12 U.S.C. 1824); both permit state-chartered organizations to join; and both regulate member institutions so that insolvency and loss may be prevented. This Court has held that such federal agencies exercise functions within the constitutional powers of Congress which may be protected by criminal legislation. See *Westfall* v. *United States*, 274 U.S. 256, 258.

2. Petitioner contends that proof of an overt act not charged, *i.e.*, his direction to co-conspirator Edward Szarabajka in late February or early March 1964 (see *supra*, pp. 5-6), was improperly received and that without proof of such act his defense based on the statute of limitations would have been successful (Pet. 13, 29-30). The goverment, however, proved that the conspiracy had continued after February 6, 1964 (five years prior to the indictment) by overt acts that were alleged—*i.e.*, the payments by the co-conspirators of the dividends to depositors at the end of February 1964. A basic object of the conspiracy was to disguise the use of brokered deposits so that Service could continue operations. Since the money for the end of February 1964 dividends came from brokered deposits and the use of such money was unknown to the regulatory authorities, the dividend payment indicated that the agreement to misapply Service's assets and to deceive the government had continued beyond February 6, 1964. This evidence was usable against petitioner, who at that time was a

member of the conspiracy. See *Pinkerton* v. *United States*, 328 U.S. 640, 646-647.

The unalleged overt act was also admissible to show the duration of the conspiracy. In proving a conspiracy the government is not limited to overt acts pleaded. At most, proof of overt acts which have not been pleaded justifies the granting of a request for a continuance because of surprise; no such request was made in the present case. See *Reese* v. *United States*, 353 F. 2d 732, 734 (C.A. 5); *United States* v. *Armone*, 363 F. 2d 385, 400 (C.A. 2), certiorari denied *sub nom. Viscardi* v. *United States*, 385 U.S. 957; *Brulay* v. *United States*, 383 F. 2d 345, 350-351 (C.A. 9), certiorari denied, 389 U.S. 986.

3. Petitioner complains that the trial court improperly expressed a belief in the veracity of a government witness (Pet. 33). The circumstances do not support this claim. The incident occurred when defense counsel was conducting a repetitious cross-examination. In this context, the court advised him that to have a witness repeatedly restate an answer would lead the court to begin "to believe it because he says it repeatedly." When counsel objected, the court instructed the jury to disregard his belief (7 T. 1407-1408, Pet. 15-16). This is hardly comparable to the situation in *Quercia* v. *United States*, 289 U.S. 466, 471-472, where in referring to the accused the court said that wiping one's hands while testifying was always an indication of guilt. Fairly considered, the remark in the instant case was essentially a caution to counsel that his examination technique was

potentially harmful and unnecessarily time consuming.

4. Petitioner urges that the closing argument of the prosecutor "was a forthright vouching for government witnesses" (Pet. 30-31). The background for the argument was that the government had not used two witnesses it had subpoenaed whom the defense later elected to call. In argument, defense counsel urged the jury to consider the government's non-use of the two as showing its fear of making "liars" out of the witnesses whom the government had called (13 T. 2802). In reply, the prosecutor stated that the government had declined to use the two men as witnesses because "when a party puts a witness on the stand, he vouches for what that person says. He stands behind his testimony as to truth" (13 T. 2827). Although as the court below recognized such argument is not ordinarily appropriate, the prosecutor's remark was justified in order to respond to the defense imputation of improper motive. Cf. *Lawn* v. *United States*, 355 U.S. 339, 359-360, n. 15. Petitioner also argues that the court "bolstered" the veracity of the government witnesses by its adverse ruling on a defense objection to the prosecutor's argument (Pet. 32-33). By such ruling, the court neither stated nor implied that any government witness was worthy of belief. It simply exercised its function in making rulings of law.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1971.

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